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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ENVIRODYNE INDUSTRIES, INC.,

Petitioner,

—v.—

FRANK LUMPKIN, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, if no uniform federal limitations period is to be applied, this Court's decision in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), and federal policy under ERISA mandate that the timeliness of federal claims for employee benefits be governed by the Illinois five year statute of limitations for contracts not exclusively in writing, rather than the different state limitations period that the court below selected to effectuate the policy of ERISA?

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STATUTES INVOLVED

The case involves section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The text of these statutory sections is set out in full in the appendix to the petition for writ of certiorari. The decision below applied the Illinois statute of limitations for actions on a contract entirely in writing and

considered the statute governing contracts not entirely in writing, Ill. Ann. Stat. ch. 110, ¶¶ 13-205 and 13-206 (Smith-Hurd 1984), each of which also is set out in the appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents further state that at the time EDC Holding Company ("EDC"), a wholly owned subsidiary of Envirodyne Industries, Inc. ("Envirodyne") petitioned for bankruptcy under chapter 11 of the Bankruptcy Code, Envirodyne itself was in serious financial difficulty. Envirodyne now, however, is identified as a "Fortune 500" company. Respondents also do not accept the implication that EDC charitably continued to operate during bankruptcy for the benefit of its workers. Petition for Writ of Certiorari ("Petition"), p. 3 n.2. Finally, the Illinois Supreme Court has not decided the applicable statute of limita-

tions for causes of action based upon collective bargaining agreements in the pension context or under an alter ego theory.

SUMMARY OF ARGUMENT

Envirodyne argues for the first time in its petition for writ of certiorari that a uniform federal limitations period should apply to causes of action under § 502 of ERISA. However, the Court as a rule does not decide issues not raised in the courts below. Because it could easily have raised this issue below and failed to, Envirodyne has waived its argument. In fact, prior Supreme Court precedent and appellate court decisions in the Court of Appeals for the Seventh Circuit and sister courts unequivocally established the very standard and argument Envirodyne suggests only now is clear as a result of the Court's opinion in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991).

Even if the question is properly presented, under longstanding practice, Congress intended by its silence as to a limitations period in § 502(a)(1)(B), that courts adopt state statutes of limitations. This assumption is especially relevant where Congress was not silent as to the limitations period in other sections of ERISA. Moreover, no other federal law clearly provides a closer analogy than state law to respondents' cause of action. Nor do federal policy or the practicalities of litigation suggest that federal law is a significantly more appropriate vehicle of interstitial lawmaking. Indeed, the state law limitations period selected by the appellate court is most consistent with the policy of ERISA.

Respondents claims under § 502 of ERISA and § 301 of LMRA are not interdependent, hybrid claims, but wholly separate causes of action intended to effectuate

different federal policies. Thus, these claims need not be governed by the same limitations period. Moreover, § 301 establishes an express cause of action. Therefore, the Court's decision in Lampf, which involved a judicially implied cause of action, is irrelevant, and the Court's decision in UAW v. Hoosier Cardinal Corp. is applicable.

Finally, the Court of Appeals for the Seventh Circuit correctly and expressly found that Illinois' ten-year statute of limitations period for written contracts was most consistent with ERISA's policy to protect earned pension benefits, not the five-year limitations period for oral contracts. This finding is not inconsistent with Hoosier Cardinal, which involved different policy concerns and which contemplated that the limitations period applicable to § 301 could vary depending on the nature of the claim.

ARGUMENT

I. Envirodyne Has Waived Its Argument That The Limitations Period Applicable To Causes Of Action Under Section 502(a)(1)(B) Of ERISA Should Be Derived From Federal Law.

For the first time, and purportedly on the basis of the Court's decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991), Envirodyne argues that a writ of certiorari should issue so that the Court may establish a uniform limitations period for causes of action under § 502 of ERISA, 29 U.S.C. § 1132. As a rule, however, the Supreme Court "does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." Id. (quoting Duignan v. United States, 274 U.S. 195, 200 (1927)). See also Patrick v. Burget, 486 U.S. 94, 99

n.5 (1988) (Court declines to consider questions presented in a petition for certiorari not considered below).

Envirodyne acknowledges, albeit offhandedly, that it failed to argue in the courts below that federal law was the proper source for a limitations period under § 502. See Petition, p. 6 n.4. Moreover, there is nothing about Envirodyne's failure that renders it an exceptional case warranting departure from the general rule. See e.g., Youakim v. Miller, 425 U.S. 231 (1976) (subsequent agency interpretation and Solicitor General's opinion that a conflict existed between state and federal law was not available to parties below); Pollard v. United States, 352 U.S. 354, 359 (1957) (party failing to raise significant issue was acting pro se).

Envirodyne contends that it failed to argue in the courts below that federal law

was applicable on the basis of "the Seventh Circuit's unequivocal decisions applying only state law . . . and litigating prior to Lampf, Pleva." Petition, p. 6 n.4. This argument is demonstrably specious. First, the Court of Appeals for the Seventh Circuit in Central States S.E. & S.W. Areas Pension Fund v. Jordan, 873 F.2d 149, 152 (7th Cir. 1989), held that "the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy." (quoting Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (emphasis added). This is precisely the standard Envirodyne now suggests this Court apply to impose a uniform limitations period derived from federal law to causes of action based on § 502 of ERISA.

Second, other federal courts purportedly had previously either adopted or suggested a federal, rather than a state

law, limitations period for § 502. See Petition, p. 8 (and cases cited therein). Thus, at the time Envirodyne was litigating in the courts below, the argument was not innovative or unpredictable.

Finally, Envirodyne suggests that Lampf requires review of this issue because the Court's opinion there "now makes clear [that] the courts must consider federal as well as state sources of law in determining the limitations period applicable to federal claims for which Congress has not expressly provided a statute of limitations." Petition, p. 6 (emphasis supplied). Not only is Lampf, which involved a judicially implied right of action, irrelevant, see infra p. 13-15, Envirodyne's argument is wrong. The Court recognized long before Lampf the applicability of federally derived limitations periods when the use of a state statute of limitations would frustrate the policy

underlying the federal enactment. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983) (borrowing limitations period from § 10(b) of the NLRA for hybrid § 301/duty of fair representation claim); see also Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987) (borrowing Clayton Act limitations period for RICO civil action).

Thus, Envirodyne had available to it the rules of decision to raise before the courts below the very argument it presents to this Court for the first time in its petition for writ of certiorari. It did not. Instead of arguing that the appellate court should reconsider its resort to state statutes of limitations under § 502, in light of Supreme Court precedent and sister court decisions, Envirodyne consistently argued only the applicability state law.

See Brief of Defendant-Appellee, pp. 30-33.[1] It must now abide by its litigation choice.

II. In Enacting Section 502 Of ERISA Congress Intended That Courts Adopt State Statutes of Limitations.

A. The Statutory Scheme Requires Courts To Adopt State Limitations Periods For Causes of Action Under § 502(a)(1)(B).

Even assuming that Envirodyne may now raise its argument that a uniform federal limitations period should apply to causes of action under § 502 of ERISA, that

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[1] In significant contrast, the defendant in Short v. Belleville Shoe Mfg., 908 F.2d 1385, 1386-87 (7th Cir. 1990), which involved the same issue as Lampf, argued in the lower court that the court should cease looking at state law and establish a uniform federal limitations period under Rule 10b-5, in spite of a wall of contrary precedent, on the authority of Agency Holding. Petitioners in Lampf similarly argued in the courts below that a federal limitations period should apply notwithstanding controlling precedent in the Ninth Circuit. Lampf, 111 S.Ct. at 2777. Envirodyne's suggestion that it could not have raised the argument that federal law supplies the limitations period for § 502 is patently erroneous.

argument is flatly inconsistent with congressional intent. As this Court has stated previously, ERISA is a "comprehensive and reticulated statute. Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980). Accordingly, the Court has been "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985). Yet that is just the type of judicial legerdemain that Envirodyne seeks.

Section 502 does not contain an express limitations period. Congress' silence, however, is not without significance. "Given [the Supreme Court's] long-standing practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." Agency Holding, 483 U.S. at 147. In this context, "there is no

justification for the drastic sort of judicial legislation" necessary to devise a uniform federal limitations period. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702-03 (1966).

Notwithstanding this black letter rule, Envirodyne argues on the basis of Lampf that the Court should act legislatively to adopt the limitations period contained in unrelated provisions of ERISA. Respondents may agree in the abstract that there is "no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." Lampf, 111 S.Ct. at 2780; Petition, p. 13. Unfortunately for Envirodyne, that is not the case here. Because Lampf involved a judicially implied cause of action, the Court's "task [was] complicated by the nontraditional origins

of the § 10(b) cause of action." Lampf, 111 S.Ct. at 2779. Obviously, under these circumstances, "consideration of state-law alternatives [is] unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment." Id. at 2782.

Here, however, the cause of action is express. The Court need not surmise how Congress would have struck the balance: Congress did strike the balance. For certain causes of action under ERISA, Congress determined that a uniform federal limitations period was appropriate. See e.g., § 413, 29 U.S.C. § 1113 (breach of fiduciary duty); § 4003, 29 U.S.C. § 1303 (claims by and against the PBGC). At the same time, Congress did not provide a limitations period for § 502, thereby intending that courts apply state statutes of limitations to causes of action under § 502. It is ludicrous to suggest that

Congress' deafening silence in this regard was an oversight.[2] Envirodyne may be dissatisfied with the "chaos" Congress' choice creates, but this is not the proper forum to resolve that dissatisfaction. It is not the business of courts to engage in a fundamental rewriting of federal law.

B. Respondents Cause of Action Under § 502(a)(1)(B) Does Not Fit Within The Narrow Exception To The Applicability Of State Law.

The Court has recognized "a closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law." Reed v. United

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[2] Envirodyne's argument that courts are preempted from borrowing state statutes of limitations by ERISA borders on the frivolous. Even assuming that statutes of limitations are the type of substantive law potentially preempted by ERISA, see Hoosier Cardinal, 383 U.S. at 703 n.4, state statutes of limitations do not apply by force of state law; rather Congress, by its silence, in effect incorporates state statutes of limitations into federal law. Thus, to argue that such state statutes are preempted simply begs the question.

Transp. Union, 488 U.S. 319, 324 (1989). The Court will look to federal law "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" Id. (quoting DelCostello, 432 U.S. 151, 172 (1983)). However, "[r]ooted as it is in the expectations of Congress, the 'state-borrowing doctrine' may not be lightly abandoned." Lampf, 111 S.Ct. at 2778 (plurality). Accordingly, "application of a federal statute will be unusual." Reed, 488 U.S. at 324.

In DelCostello, for example, the Court found that there was simply no close analogy in ordinary state law for the hybrid federal claim at issue and further that the closest state statute of limita-

tions failed to provide a sufficient opportunity to vindicate the federal right. DelCostello, 462 U.S. at 165-66. Similarly, in Agency Holding, the court concluded that the cause of action involved (RICO) "encompasses numerous and diverse topics and subtopics" predicated upon a pattern of racketeering and enterprise - - concepts "simply unknown at common law." Agency Holding, 483 U.S. at 149-50. The Court also "found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy." Lampf, 111 S.Ct. at 2785 (Stevens, J., dissenting).

Envirodyne has failed to demonstrate that it falls within this "narrow exception." Respondents' cause of action under § 502(a)(1)(B) is a straightforward claim to recover benefits due under the pension plan. This is a textbook breach of contract claim under state law. Indeed,

Envirodyne does not argue that state law does not provide a close analogy to respondents' claims. Instead, Envirodyne makes the strained comparative that causes of action in other sections of ERISA provide a closer analogy. Petition, p. 13. Specifically, Envirodyne argues that § 413 (breach of fiduciary duty) and § 4003 (claims by and against the PBGC) are more closely analogous to actions under § 502 of ERISA. Petition, pp. 14-15.

A claim for breach of fiduciary duty, with the unique and substantial obligations imposed on a fiduciary, is qualitatively different from a breach of contract claim. Nor is it surprising that Congress would impose a different limitations period for suits by or against the Pension Benefit Guaranty Corporation ("PBGC"). Congress established the PBGC to administer plan termination rules and to provide pension benefit insurance for covered defined

benefit plans. Congress understandably was more concerned about the potential financial burdens placed on the PBGC and the fair and efficient functioning of this federally created insurance agency. This concern is significantly different from one where the dispute is between a plan and its participants. Thus, the express limitations period applicable to claims involving § 413 and § 4003 do not clearly provide a closer analogy than state law.[3]

Envirodyne also fails to articulate any policy of ERISA that would be disserved by borrowing state statutes of limitations. The fundamental goal of ERISA is "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary respon-

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[3] It should be noted that "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations." Agency Holding, 483 U.S. at 147.

sibilities under state law or recovery of benefits due to participants." S. Rep. No. 127, 93d Cong., 1st Sess. 35 ("Senate Report"), reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4871. "One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid." Nachman, 446 U.S. at 374 (footnote omitted); see also Russell, 473 U.S. at 148 (recognizing repeatedly emphasized purpose of ERISA to protect contractually defined benefits). This is precisely the federal policy considered by the appellate court in concluding that Illinois' ten-year statute of limitations applicable to written contracts would best protect the rights of pension plan participants and was most

consistent with the policy underlying ERISA. App. at 29a-30a.[4]

The constant refrain in Envirodyne's argument is that the goal of ERISA is to impose national uniformity in the area of pension benefits. Envirodyne contends that the need for uniformity "compel[s] the selection of the ERISA limitations period for ERISA claims." Petition, p. 16. Aside from being a non sequitur,[5] Envirodyne's argument proves too much. Uniformity is a laudable goal certainly. See Hoosier Cardinal, 383 U.S. at 702-03. But the overriding goal of ERISA is to protect pension rights. And, in this context,

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[4] References to the appendix to the petition for writ of certiorari are cited as "App. at _____."

[5] The goal of uniformity would be equally well served, and ERISA policy better served, by applying a uniform 10 year statute of limitations for causes of action under § 502(a)(1)(B). Nothing inherent in the notion of uniformity compels the selection of any particular limitations period, just that a single period or type be selected.

Congress may simply not have wished to diminish any longer limitations periods available in the various states. This is a rational legislative choice.

Significantly, Envirodyne's argument could be made in every case that federal courts borrow from state law. Inherent in this concept is the potential for variation. Thus, taking Envirodyne's argument at its face, every case would be a case for uniformity, so that the exception necessarily would swallow the general rule. Yet this Court has steadfastly reiterated that "application of a federal statute will be unusual." Reed, 488 U.S. at 324. Accordingly, courts are bound to borrow state law limitations periods "absent some compelling demonstration" that the federal policies at stake make a federal limitations period significantly more appropriate. Id. at 327. Relying as it does solely on the need for uniformity, En-

virodyne fails to make that compelling demonstration.

Finally, the practicalities of litigation similarly do not compel the Court to create a federal limitations period for causes of action under § 502(a)(1)(B). Envirodyne argues that potential or actual variation in "the applicable limitations period under ERISA § 502 [is] particularly problematic." Petition, p. 16. The short and simple answer to this concern is that, even if true, it embodies the enforcement mechanism enacted by Congress. It is without the power of the courts to alter that statutory scheme simply for judicial expedience.

In addition, the litigation difficulties are overstated. First, as demonstrated above, a claim under § 502(a)(1)(B) is "readily analogized" to a breach of contract action for purposes of determining the applicable state statute of limita-

tions. Cf. Reed, 488 U.S. at 326. For this reason, the majority of courts have so characterized such claims. See Petition, p. 10. Thus, the litigation uncertainty suggested by Envirodyne is more imagined than real. Second, courts regularly make, and potential litigants anticipate, precisely the kind of choice-of-law determinations that Envirodyne argues are intractable. This hardly suggests that federal law is the only practical source of a limitations period for § 502.

The Court must assume by Congress' silence that Congress intended for courts to apply state statutes of limitations to § 502(a)(1)(B). As other contemporaneous sections of ERISA demonstrate, Congress knew how to select a uniform federal limitations period when it deemed such uniformity appropriate. In § 502, it did not. That choice ends this Court's inquiry. Moreover, Envirodyne has failed to

demonstrate that any federal law clearly is a closer analogy or that federal policy and the practicalities of litigation make a uniform federal limitations period a significantly more appropriate vehicle for interstitial lawmaking. For these reasons, the Court should deny Envirodyne's petition for writ of certiorari.

III. The Relationship Between The Court's Decisions in Lampf and Hoosier Cardinal Is Not Murky.

Envirodyne argues, on the basis of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that respondents' "hybrid ERISA § 502- LMRA § 301 claim should be governed by one limitations period." Petition, p. 20. This argument is without merit. A hybrid § 301/duty of fair representation claim is more than a separate, but identical, claim that makes a uniform limitations period convenient. It is a single action that "yokes together interdependent claims that

could only very impractically be treated as governed by different statutes of limitations." Reed, 488 U.S. at 329 n.4.

To characterize the separate claims brought by respondents as similarly hybrid in nature is far-fetched. In fact, although perhaps not unusual, it is a mere fortuity, rather than a requisite interdependence, that a participant has both a claim for benefits under a pension plan and for breach of a collective bargaining agreement. Obviously, millions of employees are participants in a pension plan without being covered by a collective bargaining agreement.

Perhaps more importantly, § 502 of ERISA implements a federal policy to protect employee pension benefits "that simply had no part in the design of a statute of limitations for unfair labor practice charges." Id. at 332. Thus, the dictate of Hoosier Cardinal to borrow state

law is fully applicable to respondents separate § 301 claims.

Envirodyne further argues that Lampf applies to respondents' § 301 claim even if that claim is regarded separately from their § 502 claim. It abuses logic, however, to contend that because Congress left the substantive contours of § 301 to the judiciary and federal common law, a § 301 claim is "functionally equivalent to a judicially implied cause of action." Petition, p. 21. Section 301 expressly creates a cause of action. It is silent as to the limitations period for such actions. This silence, however, conveys a congressional intent that the courts borrow analogous state statutes of limitations. Therefore, nothing about a § 301 cause of action is implied. What Envirodyne means to say is that it does not like the general rule, to which it can offer no legitimate exception. Unfortunately for Envirodyne,

such wishful thinking is not a sufficient basis for the Court to issue a writ of certiorari.

IV. The Holding Of The Court Of Appeals For The Seventh Circuit Is Consistent With Federal Policy And Does Not Conflict With Hoosier Cardinal Or The Decisions Of Other Courts Of Appeals.

A court should accept the characterization of an action that state law would impose unless that characterization is unreasonable or inconsistent with federal policy. Hoosier Cardinal, 383 U.S. at 706. Incredibly, Envirodyne argues that the Court of Appeals for the Seventh Circuit failed to make the crucial finding that the Illinois choice-of-law limitations period was inconsistent with federal policy. Petition, p. 24.

However, the finding of the appellate court could not be plainer. Although it found the decisions of the Illinois courts helpful, the court concluded that it was not bound by those decisions because "as a

matter of federal policy the longer statute of limitations should apply, because [respondents'] claims are for vested pension benefits that have allegedly become due to them over a period of years. To truncate the available period for claims by applying the shorter statute of limitations would fly in the face of ERISA." App. at 29a-30a (emphasis added). The court further concluded that "it would surely yield a result anomalous with the legislative history and purpose of ERISA to nip claims for vested pension benefits in the bud through application of the shorter statute of limitations." App. at 30a.

Envirodyne also argues alternatively that the appellate court misconstrued federal policy under ERISA. In fact, the appellate court's holding best effectuates the core purpose underlying ERISA. It is the policy of ERISA to eliminate procedural obstacles to employees' otherwise rightful

recovery of pension benefits, not to allow employers to avoid the responsibility to pay promised and anticipated benefits. See Senate Report at 4871; supra, pp. 19-20; App. at 20a. The ten-year statute of limitations is most consistent with this fundamental federal policy.[6]

This result is fully consistent with Hoosier Cardinal, which dealt with a cause of action under the LMRA, and implements a far different federal labor policy, and the need to resolve labor disputes efficiently. The policy considerations at work in Hoosier Cardinal are simply inapposite here. In addition, nothing in Hoosier Cardinal requires that respondents' claims under § 301 be characterized as based on an oral contract. Indeed, the Hoosier Car-

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[6] The argument that shorter statutes of limitations are not repugnant to ERISA misses the point. As demonstrated above, the ERISA sections cited by Envirodyne are not analogous to claims under § 502(a)(1)(B).

dinal Court expressly stated that "[w]hether other [§ 301] suits different from the present one might call for the application of other rules on timeliness, we are not required to decide." Hoosier Cardinal, 383 U.S. at 705 n.7. Thus, Hoosier Cardinal contemplated that the appropriate limitations period under § 301 might change depending on the nature of the claim.

Respondents essentially seek pension benefits due them under a collective bargaining agreement. Indeed, Envirodyne characterizes respondents' claims under § 301 as ones "in which other closely related federal statutes are implicated." Petition, p. 21. Envirodyne cannot have it both ways. It is this fundamental relationship and the overarching federal policy to protect employees' pension benefits that requires that the longer limitations period apply to respondents'

§ 301 claims. This conclusion is not contrary to Hoosier Cardinal and, for this reason, the Court of Appeals for the Seventh Circuit did not err.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should not issue.

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